(12)

No. 97-6146

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ANGEL J. MONGE,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA PUBLIC DEFENDERS ASSOCIATION'SMOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON THE MERITS

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INTEREST OF AMICUS

The California Public Defenders Association respectfully files this amicus curiae brief in support of petitioner's brief on the merits, regarding this Court's review of the judgement and decision of the Supreme Court of the State of California entered on August 26, 1997.

Pursuant to Rule 37, the California Public Defenders Association, hereby respectfully submits, this amicus curiae brief, in support of petitioner's brief on the merits to review the judgement and decision of the Supreme Court of the State of California entered on August 26, 1997, and in favor of this Honorable Court reversing that decision. Petitioner and respondent have both consented to the filing of this amicus curiae brief, pursuant to Rule 37.3 (copies of consent letters attached).

The California Public Defenders Association (hereafter CPDA) is the statewide association of public defenders. As such, members of this association are the primary trial and appellate counsel in the State of California for criminal defendants who are unable to afford counsel. The Association is concerned with issues affecting criminal defendants and the administration of justice throughout California, and based upon these concerns, previously filed an amicus brief with this Court on October 22, 1997, in support of the petition for writ of certiorari, prior to this Court's granting of petitioner's writ on January 16, 1998.

The instant case raises a crucial question regarding whether the Double Jeopardy Clause applies to successive non-capital sentence enhancement trials that contain all the hallmarks of a trial on guilt or innocence. The members of CPDA represent the overwhelming majority of defendants accused of crimes pending trial in this state, as well as the majority of individuals in California situated similarly to petitioner herein on appeal. Thus, CPDA has a vital and continuing interest in this issue being resolved, beyond the interest of petitioner herein.

CPDA is acutely aware of the special role which "strikes," "enhancements," and other formal penalty allegations play in California's regimen for adjudication of defendants' criminal culpability. As California's system has evolved over recent decades, the various enhancement statutes--rather than the statutes defining the underlying substantive offenses--have become the principal determinants of the degree of defendants' culpability *and of the maximum penal consequences* of their crimes. Indeed, in the 1990's, it has become quite common for enhancements or strikes to account for the majority of a defendant's total sentence, such that the portion attributable to the enhancement often dwarfs the nominal maximum statutorily authorized term for the current underlying offense. Commensurate with their importance in California's criminal justice regimen, enhancement allegations are adjudicated under the same rules as the charged substantive offenses: They are specifically alleged in the accusatory pleading, they are admitted or denied at arraignment, they are tried to a jury (or to the court, if a jury is waived), and the jury's verdict must be unanimous. During trial, the prosecution must prove each element of the enhancing allegation beyond a reasonable doubt, and all the traditional rules of evidence apply.

Prior to its decision in ***People*** v. ***Monge***, 16 Cal.4th 853, 66 Cal.Rptr. 2d 853, 941 P.2d 1121 (1997), the California Supreme Court had assumed the double jeopardy clause was fully applicable to enhancing allegations, and California appellate courts had explicitly so held.[1] But the California Supreme Court's *Monge* opinion robs defense verdicts on enhancing allegations of the finality which attends all other forms of acquittals.

This case represents this Court's first occasion to consider any of the constitutional implications of California's regimen of

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[1]See, e.g., ***People v. Brookins***, 215 Cal.App.3d 1297, 264 Cal.Rptr. 240 (1989)

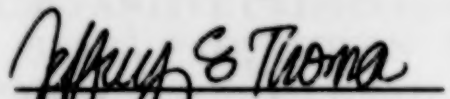
"three strikes" and other non-capital enhancing allegations. CPDA believes that it is essential that this Court understand both the procedures associated with California enhancement trials and the role which these statutes have acquired in authorizing sentences far in excess of the maximum statutory term for the underlying criminal counts. CPDA believes that, as amicus curiae, it can assist this Court by addressing how the "three strikes" statute at issue in *Monge* fits into California's larger framework of formal enhancing allegations.

Because so many clients of this organization's members are affected by any decision on this issue, CPDA believes it has a sufficient interest and good reason to present this amicus brief. The issues raised on the application of the Double Jeopardy Clause to these proceedings are more encompassing than just those presented under the facts and factors as applied to Mr. Monge, so it is believed that the brief which amicus curiae is requesting permission to file will contain a more complete argument on the constitutional issue as it applies to all defendants and appellants.

Pursuant to Rule 37.6 of the rules of this Court, amici State that no counsel for a party authored this brief in whole or in part, and that no person, other than amici and their members, made a monetary contribution to the preparation or submission of this brief.

The purpose of this brief is not to duplicate the parties' discussions of this Court's double jeopardy jurisprudence but instead to provide this Court with a comprehensive picture of how California's "strike" and enhancement procedures actually operate "on the ground." As discussed here, these allegations serve the same essential functions as traditional substantive counts, and California juries' and trial judges' adjudications of those charges are "trials" in every sense of the word.

Respectfully submitted,



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BRIEF AMICUS CURIAE

DOES THE DOUBLE JEOPARDY CLAUSE APPLY TO NONCAPITAL SENTENCING PROCEEDINGS THAT HAVE ALL THE HALLMARKS OF A TRIAL ON GUILT OR INNOCENSE?

ARGUMENT

CALIFORNIA "STRIKES" AND OTHER ENHANCING ALLEGATIONS ARE THE FUNCTIONAL EQUIVALENTS OF SUBSTANTIVE CRIMINAL COUNTS AND DESERVE THE SAME PROTECTION UNDER THE DOUBLE JEOPARDY

Monge v. ***California*** arises under California's "three strikes" regimen. §§ 667(b)-(i), 1170.12. [3] Although the "three strikes" law is relatively new, it is only one of numerous examples of California's pervasive practice of utilizing formal enhancing allegations as the principal vehicles for jury adjudication of the specific degree of a defendant's criminal conduct. CPDA is aware that several other states, as well as certain federal statutes, employ a similar nomenclature of sentence "enhancements". But this semantic similarity is misleading. Unlike many of those other states, California has imbused its non-capital penalty allegations with *all* the characteristics of traditional substantive offense counts. These allegations are tried to juries under the same

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3 The "three strikes" law consists of two substantively identical statues--one enacted by the Legislature in March 1994, § 667(b)=(i), and duplicative statute enacted by a voter initiative in November 1994, § 1170.12. This brief will refer to "three strikes" as a single law and will not distinguish between the two statutes.

pleading and evidentiary rules as the substantive counts, require comparable findings of historical fact on defined "elements," and are subject to the same requirements of proof beyond a reasonable doubt and jury unanimity. Moreover, it is the enhancement findings, rather than the statutory sentence range for the underlying offense, which determine the defendant's maximum sentence, and the enhancement statutes commonly authorize or even compel a sentence substantially in excess of the nominal maximum term for the underlying current crime.

A. Traditional Sentencing Distinguished--California's Procedures for Discretionary Sentencing Within the Range Provided for the Underlying Crime

In California, a defendant's ultimate aggregate sentence is the result of three determinations: (1) the trial jury's (or) verdict of conviction of one of more current substantive crimes, (2) the trial (or) verdicts on any enhancing allegations, and (3) the sentencing court's discretionary weighing of aggravating and mitigating factors in making various "sentence choices"(e.g., selection of upper, middle or base term; choice between consecutive and concurrent sentencing, etc.). "Three strikes' and the other enhancing allegations discussed herein fall squarely within the second of these categories. However, as a preliminary matter, it is crucial to distinguish these formally adjudicated enhancement allegations from the third category--the more traditional sentencing factors considered int he course of the court's discretionary choices during the sentencing hearing at the time of pronouncement of judgment.

California sentencing hearings are traditional informal proceedings similar to those in most jurisdictions and have none of the formal adjudicative characteristics of California enhancement proceedings. At sentencing, the judge makes a

number of discretionary choices which fix the ultimate sentence *within the range* established by the trial jury's verdicts of conviction and enhancement findings. The principal such sentence choices include the grant or denial of probation (except where probation is statutorily barred), selection of the base term of imprisonment for the principal current conviction from among the "upper," "middle," and "lower" terms for that offense, and the choice between consecutive or concurrent sentencing where there are multiple current convictions.

The California Rules of Court [4] set out a number of "aggravating" and "mitigating" circumstances to guide trial judges in the exercise of these discretionary choice. See Rules of Court, rules 421, 423, 425, 428(b); see also rules 414, 413. In contract to California enhancement and "strike" statutes, which define the "elements" of enhancing allegations with the same precision as the statutes defining criminal offenses, the "mitigating" and "aggravating" factors are more loosely defined and (as discussed in petitioner Monge's brief) call upon the sentencing judge to make discretionary "normative" judgments rahter than discrete findings of historical fact. Se e.g. rule 421(a)(1) ("cruelty, viciousness, or callousness"); rule 421(b)(1) ("serious danger to society"); Rules 423(b)(6) & 421(b)(5) ("satisfactory" or "Unsatisfactory" performance on probation or parole); rule 421(b)(2) ("increasing seriousness" of convictions or juvenile adjudications); rule 423(b)(1) ("insignificant" prior criminal record). Moreover, while all California crimes and punishment allegations are statutorily defined and limited, §§ 6, 13, the sentencing rules' lists of aggravating and mitigating factors are illustrative rather than exclusive. Rule 408(a); see, e.g., ***People*** v. ***Taylor***, 92 Cal.App.3d 831, 155 Cal.Rptr. 62 (1979)(unadjudicated

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[4] All further reference to "Rules" are to the California Rules of Court, unless otherwise indicated.

arrests); ***People*** v. ***Kellett***, 134 Cal.App.3d 949, 692, 185 Cal.Rptr. 1 (1982)(same); ***People*** v. ***Combs***, 184 Cal.App.3d 508, 511,299 Cal.Rptr. 133 (1986)(bail status).

The aggravating factors employed to deny probation, impose an upper term, or choose consecutive rather than concurrent sentencing are not subject to formal pleading and proof requirements.[5] They need only be established by a preponderance, Rule 420(b), and, most importantly, formal rules of evidence do not apply. The sentencing judge typically relies on extrajudicial hearsay contained in the probation or other pre-sentence report, and the defendant has no right to call and cross-examine the author of that report. See ***People*** v. ***Arbuckle***, 22 Cal.3d 749, 753-756, 150 Cal.Rptr. 778, 587 P.2d 220 (1978).

In all these respects, the hearing which attends the pronouncement of judgment in California conforms to the traditional American model of sentencing, bearing none of the customary "hallmarks" of a criminal trial (pleading, rules of evidence, reasonable doubt burden, right to jury determination, etc.,). Though the sentencing judge may incidentally determine some factual matters in the course of considering aggravating and mitigating factors, the judge's principal role is the quintessentially *judicial* one of exercising discretion in the choosing between more punitive and more lenient options as to each of the "sentence choices" (choice of base term, consecutive/concurrent sentencing, etc.) contributing to the aggregate term. But all discretionary choices at sentencing simply adjust the defendant's sentence *within the range* established by the jury's or judge's trial verdicts on the conviction counts and enhancing allegations.

As described below, California's regimen of "strikes" and

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See, e.g., ***People*** v. ***Dorsch*** (1992) 3 Cal.App.4th 1346,5 Cal.Rptr.2d 327 (prior convictions triggering presumption of probation ineligibility under § 1203(e)(4)).

other enhancing allegations bears no resemblance to the more traditional discretionary sentencing choices made at the time of the judgement. These enhancing allegations are part and parcel of the *trial*, involve findings of historical fact on specific statutorily-defined elements similar to those on the substantive offense counts, and authorize punishment in excess of the statutory maximum terms provided for the defendant's current offense.

B. Unlike Traditional Selection of a Term Within the Sentencing Range for the Current Crime, California's "Three Strikes" Law and other Enhancements Authorize Sentences Substantially in Excess of the Statutorily Prescribed maximum Term for the Current Offense.

Unlike non-capital sentencing schemes which this Court has considered in the past, California's "strikes," "enhancements" and other "penalty allegations" authorize punishment over and above the statutory maximum term specified for a defendant's current offense or offenses. In finding that the Sixth Amendment right to jury trial and the Fourteenth Amendment requirement of proof beyond a reasonable doubt did not apply to Pennsylvania's "mandatory minimum" provisions for arming during a felony, this Court emphasized repeatedly that the firearm factor did not expose a defendant "to greater or additional punishment" than statutorily prescribed for the current conviction offense. ***McMillan*** v. ***Pennsylvania***, 477 U.S. 79, 88 106S.Ct 2411, 91 L.Ed.2d 67(1986):[6]

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[6] In distinguishing California "strikes" from the "mandatory minimum" considered in ***McMillan***, CPDA does not suggest that the same standards govern the constitutional rights asserted in the two cases. On the contrary,

> Section 9712 *neither alters the maximum penalty* for the crime committed nor creates a separate offense *calling for a separate penalty;* it operates solely to limit the sentencing court's discretion in selecting a penalty *within the range available to it without the special finding* of visible possession of a firearm, *Id,* at 88-89, emphasis added.

The same is true of the federal sentencing guidelines. Although various aggravating factors (weapon use, prior convictions, etc.) may move the sentence selection up or down the ladder of potentially available terms for the current conviction offense, *in no event can a guidelines factor result in a term in excess of the "statutorily authorized maximum sentence" for the current crime.* U.S. Sentencing Guidelines §§ 5G1.1(a), 5G1.1(c)(1).

On that ground, this Court found no double jeopardy bar to a conviction based on criminal conduct which had previously been considered as "relevant conduct" in calculating the defendant's guidelines sentence on an earlier separate conviction. ***Witte*** v. ***United States*** (1995) 515 U.S.389 115 S.Ct 2199, 132 L.Ed.2d 351. Echoing its comments in ***McMillan***, the Court emphasized that, in the earlier case, the separate criminal conduct had merely been "used to enhance petitioner's sentence *within the range authorized by statute"* for the underlying conviction offense" ***Id.***

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it is well established that double jeopardy protections apply in a number of proceedings in which there is no Sixth Amendment right to a jury--such as juvenile delinquency trials, ***Breed*** v. ***Jones*** (1975) 421 U.S. 519, 528-531,95 S.Ct. 1779, 44 L.Ed.2d 346 and, of course, capital penalty trials, ***Arizona*** v. ***Rumsey***, 467 U.S. at 203,210, 104 S.Ct. 2305, 81 L.Ed.2.d 164..

at 399, emphasis added.[7] "The higher guidelines range [resulting from consideration of the separate conduct], however, *still falls within the scope of the legislatively authorized penalty* (5-40 years)" for the conviction offense. *Ibid.*, emphasis added. Indeed, the ***Witte*** majority viewed this characteristic as so significant that it repeated it in the opinion's concluding synopsis of the holding: "Because consideration of relevant conduct in determining a defendant's sentence *within the legislatively authorized punishment range* does not constitute punishment for that conduct, the instant prosecution does not violate the Double Jeopardy Clause's prohibition against the imposition of multiple punishment for the same offense." *Id.* At 406, emphasis added.

Sentencing provisions such as Pennsylvania's "mandatory-minimum" statute or the federal sentencing guidelines simply represent more elaborate mechanisms for weighing traditional sentencing factors, such as the aggravating and mitigating circumstances considered by California courts in choosing among lover, middle and upper terms. Cf..Rules Rules 421, 423. That is, such provision may "dictate[] the precise weight" accorded particular sentencing considerations and may even limit sentencing discretion by raising the *minimum* permissible term for the current offense. ***McMillan***, 477 U.S. at 89-90; ***Witte***, 515 U.S .at 401. But they do not and cannot increase the sentence above the *maximum* statutorily authorized term for the current offense.

California penalty allegations are completely different. Though these statutes employ a variety of mechanisms for increasing defendants' sentences, their common characteristic is the authorization of a sentence in excess of the statutorily

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[7] See also ***Witte***, 115 U.S. at 401, quoting ***McMillan's*** description of the Pennsylvania statute as "neither alter[ing] the maximum penalty" for the current crime nor "calling for a separate penalty." ***McMillan***, 477 U.S. at 87-88.

prescribed upper term for the defendant's current offense. Most California sentencing allegations take the form of "enhancements" within the state's technical definition of that term— "an additional term of imprisonment added to the base term." Rule 405(c). In other words, the enhancement consists of a fixed term of years added *on top* of the sentence for the current offense. Among the most commonly charged of these are 5-year enhancements for prior "serious felonies", § 667(a), enhancements of 9 or 15 years for kidnaping for purposes of sexual assault, § 667.8, various enhancements ranging from 3 to 10 years for firearm use, §§12022.5, 12022.55, "quantity enhancements" ranging from 3 to 25 years for drug offenses, Cal. Health & Saf. Code § 11370.4, and numerous lesser enhancements on such diverse factual elements as prior prison terms, age of the victim, bail or O.R. status, infliction of great bodily injury, and value of stolen property. E.G. §§ 667.5, 667.9, 667.10, 12022.1, 12022.7, 12022.8, 12022.6.[8] In the language of ***McMillan*** and ***Witte***, each of these enhancements "call[s] for a separate penalty" in addition to the term for the current crime. ***McMillan***, 477 U.S. at 88; ***Witte***, 515 U.S. at 401.

Another set of California penalty allegations function through the other means considered and distinguished in ***McMillan*** and ***Witte***--by "alter[ing] the maximum penalty for the crime committed." ***McMillan*** at 87-88; ***Witte*** at 515 U.S. at 401. The "three strikes" law under which Monge was tried and sentenced is a prime example. §§ 667(b)-(i); 1170.12. It applies broadly to *any* current felony trial, where the prosecution alleges

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[8] Effective January 1998, the California Legislature has increased the firearm enhancements by enacting a new "10-20-life" statute, § 12022.53. Like other enhancements, these additional penalties for firearm use are imposed "in addition to and consecutive to the punishment prescribed" for the current conviction offense. § 12022.53(b)-(d).

and proves that the defendant has one or more prior "serious" or "violent" felony convictions. ***People*** v. ***Superior Court (Romero)***, 13 Cal.4th 497, 505, 529, 53 Cal.Rptr.2d 789, 917 P.2d 628 (1996). The "three strikes" law establishes "alternative sentencing scheme for the current offense" which "when applicable, *takes the place of whatever law would otherwise determine the defendant's sentence for the current offense.*" ***Id.***, 13 Cal.4th at 527, 524, emphasis added. Monge was tried and sentenced under the law's "second strike" provisions which authorized the sentencing court to *double* the term otherwise available for his current current marijuana offense. §§ 667.(e)(1), 1170.12(c)(1). The law's "third strike" provisions go still further and require an indeterminate term of *at least* 25 years to life. § 667(e)(2)(A), 1170.12(c)(2)(A). [9]

Other penalty allegations which (like "three strikes") replace the current offenses's statutorily authorized sentencing range with "alternative sentencing schemes" includes California's recent "one strike" law for sex offenses, § 667.61, its various "habitual offender" statutes, e.g. § 667.7, [10] and its special sentencing statutes for petit theft with a prior, § 666, and attempted premeditated murder, § 664(a). In addition to increasing the length of the defendant's sentence beyond the maximum statutory term for the current offense, many of these penalty provisions fundamentally alter the *nature* of the sentence imposed.

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Under the law's somewhat arcane "third strike" formula, the minimum term for the indeterminate life sentence is set as the *greater* of 24 years, triple the term otherwise provided for the current conviction, or the term resulting from other enhancements. §§ 667(e)(2)(A)(i)-(iii), 1170.12(c)(2)(A)(i)-(iii). Thus, for example, while the statutorily prescribed term for second-degree murder is 15 years to life, § 190(a), a "third strike" adjudication will escalate that sentence to 45 to life.

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See also §§ 667.71, 667.72, 667.75.

For most felonies, California statutes authorize a triad of fixed or "determinate" terms--such as the 3-, 5- or 7-year terms prescribed for Monge's current marijuana offense. Cal. Health & Saf. Code § 11361(a). But California's "third strike" provisions (as well as various other "alternative sentencing schemes") replace these fixed sentences with various indeterminate life terms, such as 25 years to life. E.G., §§ 667(e)(2)(A), 1170.12(c)(2)(A). Under California's "habitual offender" law, a defendant may even receive a sentence of life *without possibility of parole,* § 667.7(a)(2) for a current crime (e.g., battery with serious bodily injury, § 243(d) with a statutorily authorized maximum term of only four years.

Under some California statutes, the penalty allegations are the only thing which exposes the defendant to a state prison term. For example, petit theft is a misdemeanor punishable with a *county jail* sentence "not exceeding six months," § 490, but pleading and proof of a prior theft conviction triggers felony punishment: a state prison sentence of up to three years. § 666; cf. § 18. Yet, the California Supreme Court has declared that "petit theft with a prior," § 666, represents a form of sentence enhancement, not a distinct offence. ***People*** v. ***Bouzas***, 53 Cal.3d 467, 470-480, 279 Cal.Rptr. 847, 807 P.2d 706 (1991).[11]

Finally, it bears emphasis that California's various "enhancements" and other "penalty provisions" often operate cumulatively with one another. Thus, the finding that Monge had a prior "serious felony conviction" (or "strike") doubled the term for his current marijuana crime from five years to ten years, §§ 667(e)(1), 1170.12(c)(1), and the finding that he had served a prison term for that same prior conviction resulted in imposition

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[11] The same is true of California's provision for felony punishment (up to 3 years in state prison, § 18) for repeat drunk drivers. Cal.Veh. Code § 23175; see ***People*** v. ***Weathington***, 231 Cal.App.3d 69, 86-90, 282 Cal.Rptr. 170 (1991).

of an additional 1-year enhancement, § 667.5(b), bringing Monge's total term to 11 years.

Frequently, the cumulative effect is even greater. For instance, both the five-year enhancement provisions, § 667 and the second- and third-strike punishments of that same statute are tied to § 1192.7(c)'s enumeration of "serious felonies. See §§ 667.(a)(4), 667(d)(1). Thus, a "third strike" defendant whose current crime (like his prior "strikes") is also a "serious felony" will ordinarily receive a sentence of at least 35 years to life: a "third strike" indeterminate term of 25 years to life, §§ 667(e)(2)(A)(1), 1170.12(c)(2)(A)(1), *plus five-year enhancements, § 667(a), based on the same two prior "strikes."* See ***People*** v. ***Dotson*** (1997) 16 Cal.4th 547, 66 Cal.Rptr.2d 423, 941 P.2d 56 (and prior cases discussed). (And, the defendant may also receive additional enhancements (e.g., weapon use) on top of that 35 years to life to term--even where his current felony conviction (e.g., assault with a deadly weapon or robbery) has a statutorily authorized maximum term of only 4 or 5 years. See e.g., §§ 245(a)(1), 213(a)(2).) [12]

These several examples illustrate another common feature of California sentencing. Not only do the enhancements and other penalty allegations authorize punishment in excess of the statutorily prescribed upper term for the current crime., the enhancing allegations frequently account for the bulk of the

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The California courts have also approved "three strikes" terms for offenses which are ordinarily misdemeanors and only qualify for state felony treatment by virtue of "felony booster" penalty allegations such as "petty theft with a prior," § 666. See e.g., ***People*** v. ***Bury***, 50 Cal.App.4th 1873, 58 Cal.Rptr.2d 682 (1996); ***People*** v. ***Nguyen***, 54 Cal.App.4th 705, 63 Cal.Rptr.2d 173 (1997); ***People*** v. ***Terry***, 47 Cal.App.4th 329, 54 Cal.Rptr.2d 769 (1996) (each allowing "third strike" term of 25 to life where defendant's current crime was petty theft, ordinarily a misdemeanor punishable with up to 6 months in jail).

aggregate sentence and dwarf the base terms available for the current offense. [13]

In evaluating the role of Pennsylvania's "mandatory minimum" statute in ***McMillian*** and later of the federal sentencing guidelines' "relevant conduct" provisions in ***Witte***, this Court saw no indication that either sentencing factor had become "a tail which wags the dog of the substantive offense." ***McMillan***, 477 U.S. at 88; ***Witte***, 515 U.S. at 403. But that is exactly what has occurred with California's various enhancements and other penalty allegations, including the "three strikes" law at issue here. The penalty allegations typically expose a defendant to much greater "jeopardy" in the lay sense of the term--a much longer potential prison term--than substantive counts themselves.[14]

Having assigned to its penalty allegations much of the work performed by substantive offense counts in other jurisdiction--including formal charging and jury adjudication of the factual elements which determine the maximum potential

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While the examples above have principally involved "strikes" and other penalty allegations concerning prior convictions, the same is true of enhancing allegations concerning facts of the current offense. For example, the various firearm enhancements, e.g., § 12022.5, 12022.53, provide additional terms substantially longer than the base terms for most offenses commonly committed with firearms. E.g., compare § 245(a)(2) (base terms of 2, 3, 4 years for assault with a firearm) with § 12022.5(a)(1) (consecutive . enhancements of 3,4, *or 10 years* for personal firearm use during commission of any felony); compare § 213(a)(2) (base terms of 2, 3, or 5 years for robbery) and §§ 213(b), 17 (and of 16 months, 2 years or 3 years for attempted robbery), with § 12022.53 (consecutive enhancements of 10 years, 20 years or 25 years to life for firearm use during designated felonies, including robbery and attempted robbery). The quantity enhancements for drug offenses reveal a similar pattern. Compare Cal

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Cf. ***Breed*** v. ***Jones***, 421 U.S. 519, -531 95 S.Ct. 1779, 44 L.Ed.2.d,. 346 (discussing "jeopardy" concept).

sentence--California cannot withhold the double jeopardy protections which necessarily attend such an adjudication. Regardless of whether such a factual allegation is denominated a "count," an "enhancement," or a "strike," a jury's, trial judge's, or appellate court's finding of legally insufficient proof must be the final word, and the Constitution does not allow the unsuccessful prosecutor a second or third try to prove that charge.

C. California Enhancement, "Strikes," and Other Penalty Allegations Require Specific Jury Determinations of Historical Fact Which Are Indistinguishable From Traditional Findings on Elements of Substantive Counts.

In ***Bullington*** and ***Rumsey***, this Court applied double jeopardy protections to capital penalty phase proceedings which had "all the hallmarks of a trial on guilt or innocence." ***Bullington*** v. ***Missouri***, 451 U.S. at 438-446; ***Arizona*** v. ***Rumsey***, 467 U.S. at 290-212. As the majority opinion here acknowledged, in California the trial of "strikes" or other non-capital enhancing allegations has all these same trial "hallmarks,": The prosecution must formally allege them in the accusatory pleading, they are tried to a jury and require a unanimous verdict, the prosecution's proof must be admissible under the rules of evidence just as in any other trial, the defnese may offer evidence in rebuttal, and the prosectuion's burden is proof beyond a reasonable doubt. See ***Monge,*** 16 Cal.4th at 833-834, 836 (and authorities discussed there). [15]

But the similarity is much deeper than the ***Monge*** majority acknowledges. The ***Monge*** majority opinion speaks of the supposed ease with which prosecutors can prove prior conviction

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[15]See also ***Monge*** at 859, 879 (dis.opn. Of Werdegar, J.)

allegations and suggests that such trials are "simple and straightforward" affairs in which "the outcome is relatively predictable." ***Monge***. 16 Cal.4th 838. Both the premise and the characterization are wrong. Preliminarily, CPDA disputes the premise that a "simple" criminal trial is any less deserving of full constitutional protections than a complex or lengthy one. Many trials of substantive offense are "straightforward" or even perfunctory, commonly involve minimal prosecution evidence and no defense evidence, and rely principally on documentary evidence (including evidence of the defendant's "status")--e.g., such crimes as failure to register as a sex offender, § 290(g), failure to appear following bail or O.R. release, § 1320, 1320.5, or failure to file a tax return, Cal. Rev. & Tax. Code §19701. Even many drug possession cases can be tried solely on the basis of the arresting officer's testimony. Although many such criminal trials are "short and relatively predictable" in the manner ascribed to enhancement trials, ***Monge***, 16 Cal.4th at 839, surely no one would question the fact that *all* such trials, irrespective of length or complexity, place the defendant in "jeopardy." Contrary to the majority's implication, a "defendant does not need to sit for weeks or months while witnesses describe in detail to a jury and the public the specifics of his alleged unlawful activities," *ibid.*, in order to enjoy the protections of the double jeopardy clause.

Even leaving aside the ***Monge*** majority's dubious premise, the opinion's dismissive description of California "strike and enhancement trials is demonstrably wrong. The great frequency with which prior conviction findings are reversed for insufficiency of evidence, evidentiary errors, and other trial errors, belies the ***Monge*** majority's assurances that these are easily proven allegations with readily predictable outcomes.[16] Perhaps that is

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See, e.g., ***People*** v. ***Rodriguez***, 17 Cal.4th at 261-262; ***People*** v. ***Brookins***, 215 Cal.App.3d 1297, 264 Cal. Rtpr. 240 (1989); ***People*** v. ***Rhoden***, 216

true of prior conviction allegations in some other jurisdictions, but not in California. On the contrary, CPDA'S experience is that prior conviction findings are reversed the insufficiency of evidence much more frequently than convictions for current substantive offenses. [17]

The ***Monge*** opinion's portrayal of California enhancement trials as qualitatively different than other trials is equally indefensible. Not only are they tried under the same rules, California enhancing allegations involve findings of historical fact almost identical to those which jurors customarily make on offense counts. Sometimes the identical factual element which distinguishes a greater offense from a lesser included offense in one context is deemed a separate enhancing allegation in a closely related context.

California's homicide-related statutes present a stark

Ca. App.3d 1242, 1255-1257, 265 Cal.Rtpr. 355 (1989); ***People*** v. ***Jackson***, 7 Cal.App.4th 1357, 1370-1373, 10 Cal.Rptr.2d 5 (1992); ***People*** v. ***Matthews***, 229 Cal.App.3d 930, 280 Cal.Rptr. 134 (1991); ***People*** v. ***Williams***, 50 Cal.App.4th 1405, 58 Cal.Rptr.2d 517 (1996); ***People*** v. ***Lewis***, 44 Cal.App.4th 845, 52 Cal.Rptr2d 338 (1996); ***People*** v. ***Bartow***, 46 Cal.App.4th 1573, 54 Cal.Rptr.2d 482 (1996); ***People*** v. ***Gamble***, 48 Cal.App.4th 576, 55 Cal.Rptr.2d 721 (1996); ***People*** v. ***Williams*** 222Cal.App.3d 911, 272 Cal.Rptr. 212 (1990); ***People*** v. ***Best***, 56 Cal.App.4th 41, 64 Cal.Rptr.2d 809 91997); ***People*** v. ***Marquez***, 16 Cal.App.4th 115, 123-124, 20 Cal.Rptr.2d 365 (1992); ***People*** v. ***Reynolds***, 232 Cal.App.3d 1528, 284 Cal.rptr. 356 (1991); ***People*** v. ***Davis***, 42 Cal.App.4th 806, 813-820, 49 Cal.Rptr.2d 890 (1996); see also ***People*** v. ***Barre***, 11 Cal.App.4th 961, 14 Cal.Rptr.2d 307 (1992); ***People*** v. ***Nobleton***, 38 Cal.App.4th 76, 84-85, 44 Cal.Rptr.2d 611 (1995).

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The published reversals represent only the tip of the iceberg. California's appellate courts decide over 95% of criminal appeals--including both affirmances and reversals--in *unpubl opinions*. See Judicial Council of California, *1997 Judicial Council Report on Court Stati* p. 29.

example. Murder is divided into two degrees: second-degree murder is considered a lesser included offense within the greater offense of first-degree murder. One of the factual elements which distinguishes the offenses is premeditation. § 189. Premeditation has an equally significant role in the adjudication of *attempted murder* charges. Attempted murder with premeditation is punishable with an indeterminate life term; otherwise, attempted murder is punishable with a determinate term of 5, 7, or 9 years. § 664(a). Yet the California Supreme Court recently held that, unlike murder, attempted murder is not divided into degrees, and there is no distinct offense of attempted premeditated murder of "attempted first-degree murder." Instead, there is a unitary offense of attempted murder, and premeditation represents a separate "penalty allegation," which (like other such allegations) is tried to the jury. If the allegation is found true, it subjects the defendant to an alternative sentencing scheme which displaces the triad of fixed "determinate" terms for the underlying offense of attempted murder. See ***People*** v. ***Bright*** (1996) 12 Cal.4th 652, 49 Cal.Rptr.2d 732, 909 P.2d 1354. Indeed, the California Supreme Court has expressly analogized the "three strikes" law to the premeditation allegation for attempted murder. See ***People*** v. ***Superior Court (Romero)***, 13 Cal.4th at 527. [18]

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[18] California's "kidnaping for rape" statutes tell a similar story. § 209(b) [formerly § 298(d)] establishes a distinct offense of kidnaping for purposes of rape or other offenses. ***People*** v. ***Rayford***, 9 Cal.4th 1,8-11, 36 Cal.Rptr.2d 317, 884 P.2d 1369 (1994); simple kidnaping, § 207 is a lesser included offense within the greater crime defined by § 209(b). Another statute, § 667.8, covers the identical subject and establishes penalties of 9 or 15 years (depending upon age of victim) for kidnaping for purposes of rape or other sexual offenses. But, unlike § 209(b), § 667.8 is deemed an "enhancement" which, if found true by the jury, is added to a sentence for an underlying offense of simple kidnaping (or for an underlying sexual offense). ***People*** v. ***Hernandez***, 46 Cal.3d 194, 249 Cal.Rtpr. 850, 757 P.2d 1013 (1988). The reasoning of the *Monge opinion would produce the*

Plainly, in a first-degree murder case tried on a premeditation theory, an appellate court's finding of legally insufficient evidence of premeditation would bar retrial of the first-degree charge, ***Burks*** v. ***United States***, (1978) 437 U.S. 1, 16-19, 98 S.Ct. 2141, 57 L.Ed.2d 1 (though the appellate court would remain free to reduce the conviction to the lesser included offense of second-degree murder). But, under the reasoning of the ***Monge*** majority, a similar appellate finding of insufficient evidence of premeditation in an attempted murder case evidently would raise no *federal* jeopardy bar to retrying the premeditation allegation. [19]

The *Monge* majority's denial of jeopardy protection to prior conviction allegations presents an equally intolerable anomaly. Like the facts which underlie other common enhancements, prior convictions are considered "elements" of an offense in one context and penalty allegations in another. For example, until fairly recently, most California courts and practitioners assumed that *both* "felon with a firearm," §12021, ***People*** v. ***Valentine*** (1986) 42 Cal.4th 170, 177-181, 228 Cal.Rptr. 25, 720 P.2d 913, "petit theft with a prior,' § 666, represented distinct felony offenses which included prior convictions as "element." But, in 1991, the California Supreme Court held that the latter statute, §666, represented a form of enhancement

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absurd--and manifestly unjust--result that a prosecutor's failure to prove the "purpose of rape" element would trigger the double jeopardy clause only if that conduct had gone to the jury as an element of the "offense" of current § 209(b), rather than as the mere "enhancement," § 667.8.

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The ***Monge*** majority suggested that the state constitution might still prevent retrial of a current conduct enhancement which jurors had found not true, but it disavowed the implication of a prior California opinion that the federal jeopardy clause applied to such enhancements. ***Monge***, 16 Cal.4th at 843, discussing ***People*** v. ***Superior Court (Marks)*** (1991) 1 Cal.4th 56, 78 fn. 22, 2 Cal.Rtpr.2d 389, 820 P.2d 613.

allegation which established an alternative sentencing scheme for the underlying offense of petty theft. ***People*** v. ***Bouzas***, 53 Cal.3d 465-480. Again, while a failure of proof of the prior conviction "element" of a § 12021 charge would unquestionably invoke a jeopardy bar, according to the to the ***Monge*** majority no such protections would attend an identical failure to prove a prior conviction enhancing allegation under § 666.

Neither is there any colorable basis for distinguishing penalty allegations concerning facts of the current offense (**3.g.**, premeditation, weapon use) from those for prior convictions. Preliminarily, CPDA notes that California enhancement allegations cannot be neatly divided into any such discrete categories. A number of the more important penalty allegations are hybrids which require the jury or other trier of fact to make findings concerning *both* the factual details of the current crime and the factual details of the conduct underlying prior conviction. Most notably, the five-year enhancement under § 667(a) requires findings that both the current offense and the prior conviction involved criminal conduct including all the elements of a "serious felony," as defined in § 1192.7(c). See, e.g. ***People*** v. ***Equarte***, 42 Cal.3d 456, 229 Cal.Rptr. 116, 722 P.2d 890 (1996)[20] California's "one strike" statute, § 667.61, represents another form of hybrid penalty allegation. The enhancing allegations which expose the offender to an indeterminate life sentence may consist of either a prior conviction, factual circumstances of the current crime, or some combination of the two. §§ 667.61(d)(1)-(4); see also §

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Thus for instance, it would be unusual for a § 667(a) allegation to require the current jury or other trier of fact to make findings over and above the minimum statutory elements of both the current and prior conviction offenses--e.g., whether the current felony assault conviction involved actual infliction of great bodily injury rather than just force likely to cause such injury (compare §1192.7(c)(8) with § 245(a)(1)), or that the prior second-degree burglary was of an inhabited dwelling house (see § 1192.7(c)(18)).

667.61(c).

Most importantly, regardless of whether the enhancement also includes current conduct elements, "three strikes" and other prior conviction allegations often require the current jury or judge to make findings of historical fact concerning narrowly-defined elements of the criminal conduct underlying the prior conviction. To qualify as a "strike," a prior conviction must have involved conduct including all the elements of one of the "serious felonies" listed in § 1192.7(c). See § 667(d), 1170.12(b). [21] But, as ***Monge*** itself illustrates, several of the "serious felony" definitions diverge significantly from the statutes defining some of the prior offenses which are most frequently alleged as the bases for "strikes." See ***People*** v. ***Jackson***, 37 Cal.3d 826, 831-832, 210 Ca.Rptr. 623, 694 P.2d 736 (1985). Thus, the prosecution's proof here of a prior felony assault conviction under § 245(a)(1) was deemed insufficient because it did not establish that the assault involved any of the types of conduct (e.g., *personal* weapon use or personal infliction of great bodily injury) which would qualify it as a "serious felony" and thus a "strike." ***Monge***, 16 Cal.4th at 831; see also e.g. ***People*** v. ***Rodriguez***, 17 Cal.4th at 261-262. [22]

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The "three strikes" law also references § 667.5(c)'s definitions of "violent felonies," but that list is essentially a subset of §1192.7(c)'s catalogue of "serious felonies."

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Like assault with a deadly weapon convictions, prior burglary convictions are also a frequent source of litigation under the "serious felony" and "three strikes" statues. Only a burglary of an "inhabited dwelling house" or other residence will satisfy the "serious felony" statute, § 1192.7(c)(18), but for many years California's burglary statues did not cleanly distinguish residential from other burglaries. Consequently, whenever an older burglary is charged as a "serious felony" or "strike," the prosecution must go "behind the judgment" and introduce additional evidence showing the residential nature of the burglarized structure. See ***People*** v. ***Guerrero***, 44

Moreover, allegations based on out-of-state priors almost inevitably require additional proof because the "least adjudicated elements" of other states' statutory definitions frequently fall short of the minimum elements of their California counterparts. See ***People*** v. ***Myers***, 5 Cal.4th.1193, 22 Cal.Rtpr.2d 911, 858 P.2d 301 (1993).

In all such circumstances of disparity between the elements of the prior conviction offense and those of the penalty enhancement statue, the court must instruct the jurors on the specific elements necessary to sustain the enhancing allegation--just as it instructs jurors on the elements of current offense counts. ***People*** v. ***Winslow***, 40 Cal.App.4th 680, 687-688, 46 Cal.Rtpr.2d 901 (1995) Indeed, the trial court may frequently discharge this duty by tailoring to the prior conviction allegation the same standard instructions describing the elements of currently charged crimes (e.g., residential burglary) or current conduct enhancements (e.g., deadly weapon use). See *id.*. [23]

To discharge its burden, the prosecution remains free to "go behind the judgment" and offer additional evidence from the

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Cal.3d 343, 243 Cal.Rtpr. 688,748 P.2d 1150 (1988); see, e.g., ***People*** v. ***Jackson***, 7 Cal.App.4th at 1370-1372.

Comparable issues arise under California's "habitual offender" statute, § 667.7. California's robbery statute defines the offense as a taking by "force *or* fear, " § 211 (emphasis added), but only a prior "robbery involving the use of force or a deadly weapon" will support a habitual offender finding, § 667.7(a). See *People* v. *Brookins, supra* 215 Cal.App.3d 1297.

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Moreover, the defense may also request special instructions limiting the purposes for which jurors may consider particular items of evidence from the prior case. See ***People*** v. ***Woodell,*** 17 Cal.4th __,__ Cal.Rptr __, 98 Daily Journal Daily Appellate Report 1455, 1458-9; Daily Journal. February 12, 1998

"record of conviction" showing that, notwithstanding the disparity between the statutory elements of the prior offense and the requirements of the "serious felony" statute, the actual criminal conduct underlying the prior satisfied all the factual elements of the "serious felony" definition. **People** v. ***Guerrero***. 44 Cal.3d at 355-356; **People** v. ***Myers***, 5 Cal.4th 1200. But such additional evidence must be admissible under the ordinary rules of trial evidence--including the hearsay rule and the various statutory hearsay exceptions. ***People*** v. ***Reed***, 13 Cal.4th 217, 52 Cal.Rptr.2d 106, 914 P.2d 184 (1996). [24] Thus, for example, *transcripts* from the prior case are ordinarily admissible (under the former testimony exception), ***Reed***, 13 Cal.4th at 223-230, as are the defendant's own statements (under the party admission exception). [25] But probation reports and other materials containing third-party hearsay are not. *Id.* At 230-231. [26]

Even the prior transcripts are scrutinized under the same rules as ordinary trial evidence. Thus, although California's preliminary hearing procedures permit police officers to testify to hearsay accounts provided by other witnesses, a preliminary hearing transcript containing such hearsay is not admissible during the trial of an enhancing prior. ***People*** v. ***Best, supra,*** 56 Cal.App.4th 41.

As in any other trial, the defense may rebut the prosecution's evidence. Hence, where the prosecution proceeds on a preliminary hearing or other partial transcript from the prior case,

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Accord ***People*** v. ***Woodell***, 17 Cal.4th ___,98 DJ DAR 1455, AT pp. 1457-9.

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E.g., ***People*** v. ***Abarca***. 233 Cal.App.3d 1347, 1350-1351, 285 Cal.Rptr. 213 (1991)

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See also, e.g., ***People*** v. ***Williams***, 222 Cal.App.3d at 915-918.

the defense may seek to introduce an entire trial transcript to bring out conflicts in the evidence concerning the factual elements necessary to sustain the enhancing allegations. ***People*** v. ***Bartow, supra***, 46 Cal.App.4th 1579-1582. [28]

In reviewing this evidence, the jury's or trial judge's task is much the same as in any other trial which is submitted, in whole or in part, on transcripts from a prior proceeding. As in other trials where a key witness is unavailable or the parties stipulate to submission on a prior transcript, the jury or judge must still resolve conflicts in the evidence, draw inferences from circumstantial evidence, and weigh the credibility of the witnesses who testified in the prior proceeding.

The specific subjects on which jurors must make findings are also the same as the elements of many substantive counts--e.g., use of firearm or deadly weapon, infliction of great bodily injury, the residential character of the burglarized structure. Indeed, such enhancement trials sometimes even require the jurors to make *mens rea* determinations concerning the prior criminal conduct. For example, a number of states' theft, burglary, and robbery statutes require only an intent to deprive the victim temporarily of his property, while California's statutes demand an intent to permanently deprive. See, e.g., People v. ***Marquez***, 16 Cal.App.4th at 122-123; see ***People*** v. ***Reynolds***, 232 Cal.App.3d 1533. To sustain an enhancing allegation under those circumstances, the prosecution must introduce sufficient

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Although the prosecution is limited to transcripts and other competent evidence form the prior "record of conviction," the California Supreme Court has expressly left open whether "a *defendant* would be entitled to call live witnesses to dispute the circumstances of the prior offense." *Reed, supra,* 16 Cal.4th at 229, emphasis added. In fact, though the issue has not been definitively resolved, CPDA is aware of instances in which a defendant *has* put on live testimony in a "strike" or enhancement trial. Cf., e.g., ***People*** v. ***Johnson***, 208 Cal.App.3d 19,23,256 Cal.Rptr. 16 (1989).

transcripts or other competent evidence from the prior case to permit the jurors to determine the defendant's specific intent at the time of the prior taking. [29]

Similarly, occasionally is it even necessary to relitigate *mens rea* issues from a prior *murder* case, because some states' definitions of "malice aforethought" fall short of California's definition of that concept. See ***People*** v. ***Maldanado***, 186 Cal.App.3d 863, 866, 230 Cal.Rptr. 925 (1986).

The California court have long recognized that prior conviction allegations have some many characteristics of traditional offense counts that a defendant's admission of a prior represents the functional equivalent of a guilty plea for purposes of ***Boykin*** v. ***Alabama*** 395 U.S. 238, 89 S.Ct 1709, 23 L.#d.2d 274 (1969) and requires the same advisements and waivers. See ***in re Yurko*** (1974) 10 Cal.3d 857, 863, 112 Cal.Rptr. 513, 519 P.2d 561; accord ***People*** v. ***Howard***, 1 Cal.4th 1132, 1174-1180, 5 Cal.Rptr.2d 268, 824 P.2d 1315, cer, den., 506 U.S. 942 (1992). Just as an admission of a prior conviction allegation is a form of plea, the adjudication of a contested allegation in an evidentiary hearing before a jury or trial judge is a trial, in both name and substance. The stakes are the same, the trier of fact is the same, the nature of the required findings (weapon use, specific intent, etc.) Is the same, the rules of evidence are the same, and the burden of proof is the same. California's procedures for adjudication of "strikes" and other penalty allegations are *trails*--

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For instance, in one recent unreported case, the prosecution introduced transcripts and other materials concerning three separate "third degree robbery" convictions from Oregon. The California appellate court later found sufficient evidence that the conduct underlying two of the Oregon priors satisfied all the elements of a California robbery. But the reviewing court reversed the third "serious felony" finding for insufficient evidence that the defendant had the requisite specific intent. ***People*** v. ***Banks,*** lst Dist. No. A072865, unpublished opn. (Apr. 30, 1997).

just as California's statutes and cases have always described them--and the outcomes of those trials deserve the same finality under the federal double jeopardy clause.

CONCLUSION

CPDA does not dispute the right of California or any other state to classify as "penalty allegations" or "enhancements" the factual elements which determine the maximum potential prison sentence. California's provision of all the traditional "hallmarks" of trail in the adjudication of those allegations subjects these proceedings to the same rigorous standards of fairness and reliability as the determination of the traditional substantive offense counts CPDA simply submits that where a state has utilized enhancements allegations to authorize punishment in excess of the statutorily prescribed maximum for the current offense, where the determination of those allegations has all the traditional "hallmarks" of trial, and where the jury or other trier of fact is called upon to make findings of historical fact comparable to those on ordinary criminal counts, the verdict in those trials must have the same constitutional finality as with the counts themselves.

The consequences of proof of a prior conviction enhancement are as great of the accused as proof of an offense count. The consequences for the prosecution of *failure of proof* must be the same as well: The double jeopardy clause must bar the state from successive attempts to retry the unproven allegation.

For all these reasons, CPDA respectfully urges this Court to reverse the judgment of the California Supreme Court and to bar the State of California from retrying the failed "strike" allegation.

February 19, 1998 Respectfully submitted,

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February 19, 1998

David S. Glassman
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Mr Glassman:

I am writing to you on behalf of the California Public Defenders Association, as amicus counsel in support of Angel Monge's petition for writ of certiorari in the United States Supreme Court. Pursuant to Rules 37.2, 37.3, and 37.4, I am formally requesting your permission to file an amicus brief on Mr. Monge's behalf.

It is my understanding that, based upon our previous conversation, as well as a subsequent conversation you had with Mr. Cliff Gardner, Mr. Monge's attorney, in this regard, that you will grant us your consent to file the amicus brief in this matter. I am now writing this letter to request that you write a letter in response granting us your consent in writing, and send it by fax as well as by mail. Our fax number at my office is (707) 463-5435. Although I am acting on behalf of C.P.D.A., it would be much more efficient if you could direct this letter to me at my office address:

Jeffrey E. Thoma
Mendocino County Public Defender
199 South School Street
Ukiah, CA 95482

Thank you in advance to your prompt attention and response in this matter. If you have any questions in this regard, please do not hesitate to call me at my direct phone number, (707) 463-5436.
I have enclosed my business card as well.

Sincerely,

Jeffrey E. Thoma
Member, CPDA Board of Directors
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February 19, 1998

Jeffrey E. Thoma
Mendocino County Public Defender
199 South School Street
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Attn: California Public Defenders Ass'n

RE: Angel Jaime Monge v. California
USSC No. 97-6146; Our No. LA97US0006

Dear Mr. Thoma:

Respondent consents to a filing of an amicus brief in support of Petitioner by the California Public Defenders Association.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON,
Chief Deputy Attorney General
CAROL WENDELIN POLLACK,
Senior Assistant Attorney General
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February 19, 1998

Cliff Gardner
Gardner & Derham
900 North Point, Ste # 450
San Francisco, CA

Mr Gardner:

I am writing to you on behalf of the California Public Defenders Association, as amicus counsel in support of Angel Monge's petition for writ of certiorari in the United States Supreme Court. Pursuant to Rules 37.2, 37.3, and 37.4, I am formally requesting your permission to file an amicus brief on Mr. Monge's behalf.

It is my understanding that, based upon our previous conversation, as well as your previous consent when I requested consent to file our motion for leave to file the amicus brief in support of your petition for writ of certiorari, that you will consent to our filing an amicus brief herein.

I am now writing this letter to request that you write a letter in response granting us your consent in writing, and send it by fax as well as by mail. Our fax number at my office is (707) 463-5435. Although I am acting on behalf of C.P.D.A., it would be much more efficient if you could direct this letter to me at my office address:

Jeffrey E. Thoma
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Thank you in advance to your prompt attention and response in this matter. If you have any questions in this regard, please do not hesitate to call me at my direct phone number, (707) 463-5436.

Sincerely,

Jeffrey E. Thoma

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February 19, 1998 BY FACSIMILE

Jeffrey E. Thoma
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Re: Monge v. California, No. 97-6146

Dear Mr. Thoma:

Pursuant to Rule 37.3 of the Rule of the Supreme Court of the United States, I heraby consent to have the California Public Defender's Association file an amicus brief on petitioner's behalf in the above captioned case.

Sincerely,

Cliff Gardner
for GARDNER & DERHAM